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Nos. 75-1181 and 75-1182

In the Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD A. BATTERTON, ET AL., PETITIONERS

v.

ROBERT FRANCIS, ET AL.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT FRANCIS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This submission is made in response to the Court's invitation to the Solicitor General to express the views of the United States.

QUESTION PRESENTED

The United States will discuss the following question: Whether a regulation promulgated by the Secretary of Health, Education, and Welfare that allows but does not

require state programs of aid to dependent children of unemployed fathers to exclude from the definition of "unemployment" an absence from work that derives from "conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law" or from "participation in a labor dispute" is consistent with Section 407 of the Social Security Act, which defines "dependent child" to include a needy child "who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father * * *."[1]

STATEMENT

1. Title IV of the Social Security Act, 49 Stat. 627, as amended, 42 U.S.C. 601 *et seq.*, creates a cooperative federal-state program for aid to families with dependent children (AFDC). From the program's inception in 1935 until 1961, only those families with dependent children deprived of parental support or care on account of the death, continued absence, or physical or mental incapacity of a parent were eligible for AFDC assistance. See Section 406 of the Act, as amended, 42 U.S.C. 606. In 1961, however, Congress amended the Act to permit states, at their option, to assist families with dependent children who were deprived of parental support by reason of the unemployment of a parent (AFDC-E or AFDC-UF). Section 407 of the Act, as amended, 42 U.S.C. 607; see 75 Stat. 75.[2]

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[1]We do not discuss the further question whether, if that regulation is held invalid, individuals who have voluntarily left their employment without good cause, have been discharged for gross misconduct, or are out of work due to a work stoppage resulting from a labor dispute, are "unemployed" within the meaning of the Act. In our view, if the present regulation is invalid, it should be left to the Secretary to make those determinations in the first instance.

[2]The statute was later amended to refer to dependent children of unemployed "fathers" rather than of unemployed "parents." 81 Stat. 882.

As originally enacted, Section 407 authorized each participating state to define "unemployment." 75 Stat. 75. In 1968, however, Congress amended Section 407 to provide (1) that "dependent child" included "a needy child * * * who has been deprived of parental support * * * by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father * * *" and (2) that, in order to qualify for federal assistance, a state plan must provide aid when, with limitations not relevant here, "such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days * * *." 42 U.S.C. 607(a) and (b); see 81 Stat. 882. Pursuant to that statute, the Secretary prescribed a uniform hours-worked standard of "unemployment." 34 Fed. Reg. 1146; see Jt. App. 37a.[3]

Maryland Social Services Administration Rule 200.X.A.2 denies assistance under the AFDC-UF program when the father is out of work by reason of conduct or circumstances that would render him ineligible for state unemployment insurance benefits. Under Maryland law (Ann. Code of Maryland, Art. 95A, §6 (1969 repl.)), unemployment benefits are not paid to, *inter alia*, (1) persons discharged from employment due to "gross misconduct," (2) persons out of work "due to a stoppage of work * * * which exists because of a labor dispute," and (3) persons "leaving work voluntarily without good cause" (Jt. App. 7a, 87a, 89a). Thus, in Maryland, otherwise eligible families with dependent children whose fathers fall within one of those three categories are denied AFDC-UF payments.[4]

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[3]"Jt. App." refers to the joint appendix to the petitions for a writ of certiorari.

[4]The Secretary approved the Maryland AFDC-UF plan. See Section 402 of the Act, as amended, 42 U.S.C. (and Supp. V) 602.

2. This action was brought by fathers whose families had been denied AFDC-UF benefits because they were ineligible for state unemployment compensation—some had been discharged because of gross misconduct and others were out of work due to a labor stoppage resulting from a labor dispute. The plaintiffs filed a class action in the United States District Court for the District of Maryland, alleging that the state regulation violated the Constitution, the Act, and the Secretary's regulation prescribing a uniform hours-worked standard. A three-judge court rejected the plaintiffs' constitutional arguments but held the state regulation invalid under the Secretary's regulation (*Francis* v. *Davidson*, 340 F. Supp. 351 (*Francis I*); Jt. App. 21a, 24a, 28a-29a).[5]

The court enjoined the application of the Maryland regulation (Jt. App. 54a-55a), and the case was appealed to this Court (No. 71-1447). The Solicitor General, at the Court's invitation, filed a memorandum for the United States as *amicus curiae*; the memorandum took the position that summary affirmance would be appropriate in view of the fact that the Secretary was in the process of amending the regulation to clarify that the states are entitled to vary the coverage of their programs on the basis of factors other than the number of hours worked (Jt. App. 56a-60a). The Court summarily affirmed the judgment of the district court. 409 U.S. 904.

3. The Secretary then promulgated an amended regulation, 45 C.F.R. 233.100(a)(1) (Jt. App. 125a), that retained the hours-worked standard as a minimum test

[5]The United States Chamber of Commerce's motion to intervene as a party under Rule 24(a), Fed. R. Civ. P., was denied by the district court, but the Chamber was permitted to file a brief and to participate in oral argument as *amicus curiae* (Jt. App. 4a, n. 7). The Chamber's appeal to this Court from the denial of its motion was dismissed, 409 U.S. 907, as was the Chamber's appeal to the Fourth Circuit (Jt. App. 107a-113a).

that applicants in all states were required to meet in order to be eligible for benefits as "unemployed fathers," but added that "at the option of the State, [the] definition [of "unemployed father"] need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law."

On the basis of the Secretary's amended regulation, the state defendants requested the district court to dissolve the injunction entered in *Francis I*. The Chamber of Commerce of the United States was permitted to intervene (Jt. App. 61a-1 to 61a-2), and the court requested and received the views of the Secretary as *amicus curiae* (Jt. App. 61a-2 to 78a, 82a).

The district court refused to dissolve its prior injunction (*Francis* v. *Davidson*, 379 F. Supp. 78 (*Francis II*); Jt. App. 79a-85a). With respect to the class of fathers discharged for misconduct, the court held (Jt. App. 83a; emphasis in original) that the federal and state regulations were both invalid because "a father who is discharged for cause by his employer *is* unemployed * * * [and] [u]ntil the Congress amends the statute, no combination of federal and state regulations may provide [otherwise]." With respect to the class of fathers out of work because of a labor dispute, the court agreed that such individuals did not necessarily fall within the definition of "unemployed," but held (Jt. App. 85a) the Secretary's amended regulation invalid because it "contains no standards" as required by the 1968 amendment to the Act. The court concluded that "the Maryland * * * regulation excluding those unemployed because of labor disputes remains invalid" (Jt. App. 85a).

4. In a separate action filed after the decision in *Francis I*, the same Maryland regulation was challenged

by fathers not eligible for unemployment compensation under Maryland law because they had voluntarily left their jobs without good cause. The district court, following the reasoning in *Francis II* with respect to fathers discharged for misconduct, held that a father who voluntarily quits his jot is "unemployed" within the meaning of the Act and that the state regulation therefore is invalid as applied (*Bethea* v. *Mason*, 384 F. Supp. 1274; Jt. App. 86a-98a).

5. The court of appeals consolidated the appeals from the district courts' decisions in *Francis II* and *Bethea* and affirmed *per curiam* (Jt. App. 100a-104a).

DISCUSSION

1. The central question in this case is whether the Secretary has authority to permit the states, if they so choose, to deny AFDC-UF benefits on the ground that the father's absence from work derives from "conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law." 45 C.F.R. 233.100 (a)(1). All respondents were denied AFDC-UF benefits on that ground. See p. 3, *supra*.

The courts below did not explicitly address that question. Instead, they inquired directly into whether the members of each class of respondents (except strikers; see p. 9, *infra*) were in fact "unemployed" within the meaning of Section 407 of the Social Security Act. This approach reveals a misunderstanding of the allocation of responsibility for defining "unemployed" or "unemployment" under the Act. Congress did not itself prescribe a definition of "unemployment." To the contrary, under the statutory scheme it is for the Secretary and, derivatively, for the states to give substantive content to that term in the first instance. The role of the courts is

to determine whether the Secretary's regulation is reasonable and therefore valid under the Act, not whether particular individuals or groups of individuals are in some abstract sense "unemployed." If the Secretary's regulation is found to be unreasonable, the primary responsibility for evolving suitable standards for determining unemployment should be left to him and should not be assumed by the courts. See note 1, *supra*.

The Secretary's regulation, however, is reasonable. "Unemployment," as used in the Act, is not self-defining. Congress originally provided that the term be "defined by the State[s]." 75 Stat. 75. Under that provision, the states were free to adopt definitions that met their individual priorities and perceptions of need. In 1968, Congress narrowed the states' authority to define "unemployment" by providing that such definitions must be "in accordance with standards prescribed by the Secretary." Section 407(a) of the Act. Congress authorized the Secretary to prescribe standards principally in order to eliminate existing discrepancies in the hours-worked criteria that had been adopted by the states as partial definitions of "unemployment." See *Macias* v. *Finch*, 324 F. Supp. 1252, 1256-1257 (N.D. Cal.), affirmed *sub nom. Macias* v. *Richardson*, 400 U.S. 913. Those discrepancies have been eliminated. 45 C.F.R. 233.100(a)(1). But Congress did not insist that otherwise a single, uniform national definition of "unemployment" would be required. To the contrary, by permitting the states to determine unemployment "in accordance with standards prescribed by the Secretary" rather than "as defined by the Secretary," Congress evidently contemplated that the Secretary would be free to prescribe standards that allow the states discretion to vary somewhat the coverage of their programs in response to their differing needs and policies. The language and history of the amendment fall

short of mandating a single, exclusive federal definition of "unemployment." Moreover, the AFDC-UF program is a cooperative federal-state venture that of necessity requires the accommodation of diverse, often conflicting, needs and interests, in which complete uniformity of implementation is not necessarily desirable. Thus the Secretary's regulation is not unreasonable merely because it leaves some measure of discretion to the states.

It is, moreover, consistent with the statutory purpose to permit eligibility for AFDC-UF benefits to turn upon whether the father is out of work for reasons that would render him ineligible for state unemployment compensation. Both in the statute and its legislative history, Congress recognized that the reason why an individual is not working may appropriately be considered in determining his comparative need for relief. See Section 407(b)(1)(B) of the Act; Jt. App. 43a-45a. State unemployment compensation programs reflect the same legislative understanding.

Furthermore, unemployment compensation serves substantially the same purpose as AFDC-UF relief, as Congress was aware. See Section 407(b)(2)(C)(ii) of the Act. Since eligibility for either form of relief in large part turns upon the fact of "unemployment," it is not unreasonable to give that term the same substantive content in each scheme. That is what the Secretary's regulation permits the states to do, and that is all that Maryland has done here.

2. The courts below should have had no occasion to reach the further question whether the Secretary has authority to allow the states discretion to deny AFDC-UF benefits when the father is out of work due to his "participation in a labor dispute." 45 C.F.R. 233.100(a)(1). Maryland's denial of AFDC-UF benefits to the respondent

strikers rested upon the fact that they were ineligible for unemployment compensation; that ineligibility in turn rested upon the fact that the strikes in question had resulted in a "stoppage of work." See p. 3, *supra*. Maryland apparently does not deny unemployment compensation and AFDC-UF benefits merely because of "participation in a labor dispute" without regard to work stoppage. Thus the denial of AFDC-UF benefits to the respondent strikers was based upon the "disqualification for unemployment compensation" clause, not the "participation in a labor dispute" clause, of the Secretary's regulation.

In any event, the courts below agreed that strikers could appropriately be treated as not "unemployed." Their quarrel with the regulation is that it delegates to the states the choice of either paying or not paying benefits to strikers with "no standards whatsoever" (Jt. App. 85a).[6] But, as is indicated above (pp. 7-8, *supra*), such a

[6]In holding the regulation invalid for a failure to prescribe standards, the court of appeals left standing that portion of the regulation that establishes an hours-worked criterion of unemployment. Since Maryland's denial of benefits to strikers was inconsistent with that criterion, construed as an exclusive definition of "unemployment," the court concluded that the state's regulations were invalid. Petitioner Chamber of Commerce, in No. 75-1182, argues that, as a matter of statutory interpretation, strikers are not "unemployed," and that to require the payment of welfare benefits to them is incompatible with the system of collective bargaining fostered by the National Labor Relations Act. This issue, however, does not warrant review by this Court at this time. Cf. *Kimbell, Inc.* v. *Employment Security Commission of New Mexico*, No. 75-1452, appeal dismissed for want of a substantial federal question, October 4, 1976. If the Secretary's regulation is sustained, under Maryland's regulation AFDC-UF benefits would be denied to the strikers here; in that event this case would present no occasion for consideration of the question raised by the Chamber of Commerce. Furthermore, whether strikers may be treated as unemployed under the Social Security Act, and, if so, in what circumstances, are matters to be

delegation was within the contemplation of Congress in amending the Act.

3. The question of the validity of the Secretary's regulation is important. The decisions of the courts below cast doubt upon the extent of the Secretary's authority to permit existing variations in the program coverage of the various state AFDC-UF plans and thereby upon the validity of certain denials of benefits under several of those plans.[7] Plenary review by this Court would obviate the need for case-by-case litigation with respect to each affected state plan.[8]

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decided in the first instance by the Secretary and the states. See also note 1, *supra*. Accordingly, if the Secretary's present regulation with regard to strikers is held invalid due to a failure to prescribe standards, he should be permitted to reconsider the matter and to develop appropriate standards before this Court passes final judgment on the underlying question of statutory interpretation. Since the Secretary might conclude that benefits should not be paid to strikers under any circumstances, consideration in this litigation of the question raised by the Chamber of Commerce would be premature.

[7]For example, eight jurisdictions deny benefits when the father has been discharged for cause (California, Guam, Iowa, Kansas, Nebraska, New York, Pennsylvania and West Virginia) and eight deny benefits to the families of at least some categories of strikers (Guam, Iowa, Kansas, Kentucky, Minnesota, Nebraska, Oregon, and West Virginia).

[8]On August 8, 1975, the Secretary published a Notice of Proposed Rulemaking setting forth for public comment a proposed amendment to his regulation. 40 Fed. Reg. 33461; see Jt. App. 121a-124a. We are informed that the Secretary has no present intention of adopting the proposed amendment. Thus, contrary to respondents' suggestion (Br. in Opp. 3-4), and unlike the situation that pertained when this Court considered *Francis I*, the question presented here is not likely to be deprived of prospective significance by an imminent amendment to the Secretary's regulation.

CONCLUSION

The petition for a writ of certiorari in No. 75-1181 should be granted. The petition for a writ of certiorari in No. 75-1182 should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.